

1 **BEFORE THE FEDERAL ELECTION COMMISSION**

2
3 In the Matter of)

4)
5 Plumbers and Pipefitters Local)
6 Union No. 9)

7) MUR 7028

8 Plumbers and Pipefitters Local)
9 Union No. 9 PAC and)
10 Michael Maloney in his official)
11 capacity as treasurer)
12)

13
14 **SECOND GENERAL COUNSEL'S REPORT**

15
16 **I. ACTIONS RECOMMENDED**

17 (1) Enter into pre-probable cause conciliation with Plumbers and Pipefitters Local Union
18 No. 9 (the "Union") and Plumbers and Pipefitters Local Union No. 9 PAC (the "PAC") and
19 Michael Maloney in his official capacity as treasurer; (2) Approve the attached joint conciliation
20 agreement; and (3) Approve the appropriate letters.

21 **II. BACKGROUND**

22 The Complaint in this matter alleged that contributions to the PAC were withheld from
23 the paychecks of Union members, including the Complainant Rupert Baptiste, without
24 authorization. The Commission found reason to believe that the Union and PAC (collectively,
25 "Respondents") violated 52 U.S.C. § 30118(b)(3)(A)-(C) and 11 C.F.R. § 114.5(a)(2)-(5) by
26 soliciting and accepting PAC contributions via payroll deduction that were not authorized by the
27 contributor. The Office of the General Counsel ("OGC") investigated to determine the number
28 and amount of contributions made to the PAC without appropriate authorizations.

29 The investigation, the details of which are described below, revealed that the Union and
30 the PAC only obtained individual written authorizations for PAC contributions from 125 of the
31 1,310 Union members who made \$2,375,742.49 in contributions to the PAC via payroll

1 deduction between 2012 and 2017.¹ Further, the 125 written authorizations the PAC produced
2 did not contain all the information and disclaimers required by the Act and regulations.²

3 In response, Michael Maloney, the PAC's treasurer (and the Union's Business Manager)
4 states that he followed the practices of his predecessors, and that members were orally informed
5 of and given the opportunity to opt out of the payroll deductions for PAC contributions.³
6 Maloney further states that he was unaware that individual written authorizations were required
7 for PAC contributions.⁴ Finally, Respondents state that they are seeking appropriate written
8 authorizations for PAC contributions, and they request pre-probable cause conciliation.

9 In summary, the evidence gathered during the investigation confirms the Commission's
10 reason-to-believe findings, and revealed many additional, similar violations. Thus, we
11 recommend that the Commission authorize pre-probable cause conciliation with the Union and
12 the PAC with a joint opening settlement offer of \$109,000.

¹ During the investigation, Respondents provided e-mails, responses to interrogatories, and a sworn certification from the Union's Business Manager and PAC treasurer, Michael Maloney. See E-mail from Andrew Watson, Esq. to Kimberly Hart, Esq., OGC, (Response to Investigative Questions), MUR 7028 (Plumbers and Pipefitters) (June 16, 2017) ("June 16, 2017 E-mail"); E-Mail from Jessica Johnson to Kimberly Hart, Esq., OGC (Response to Investigative Questions), MUR 7028 (Plumbers and Pipefitters) (Aug. 4, 2017) ("Aug. 4, 2017 E-mail"); E-mail from Andrew Watson, Esq. to Kimberly Hart, Esq., OGC (Response to Investigative Questions), MUR 7028 (Plumbers and Pipefitters) (Sept. 12, 2017) ("RAC Unit Authorization Forms"); E-mail from Andrew Watson, Esq. to Kimberly Hart, Esq., OGC, (Response to Investigative Questions), MUR 7028 (Plumbers and Pipefitters) (Oct. 26, 2017) ("Oct. 26, 2017 E-mail."); E-mail from Andrew Watson, Esq. to Kimberly Hart, Esq., OGC (MUR 7028) (Plumbers and Pipefitters) (Nov. 2, 2017) ("Nov. 2, 2017 E-mail"); E-mail from Andrew Watson, Esq. to Kimberly Hart, OGC (MUR 7028) (Plumbers and Pipefitters) (Dec. 1, 2017) ("Dec. 1, 2017 E-mail").

² Oct. 26, 2017 E-mail.

³ Aug. 4, 2017 E-mail

⁴ *Id.*

1 **III. RESULTS OF INVESTIGATION**

2 The PAC registered as the separate segregated fund of the Union in May 1982, and has
3 filed disclosure reports with the Commission since then. Maloney became the PAC's treasurer
4 in September 2004; he is also the Union's Business Manager.⁵ Between 2012 and 2017, the
5 PAC received \$2,375,742.49 in contributions to the PAC via payroll deduction from 1,310
6 Union members.⁶ According to Respondents, the PAC obtained contributions from the Union
7 members via payroll deductions, and the amounts of the contributions were based upon the
8 number of hours each contributor worked.⁷ The third-party administrator for the PAC then
9 forwarded the allocated funds for deposit.⁸

10 The PAC did not routinely seek individual written authorizations for payroll deductions.⁹
11 Respondents provided a list of all current Union members who made SSF contributions via
12 payroll deductions between January 2012 and December 2017.¹⁰ Counsel initially indicated that
13 the SSF received \$1,920,582.53 in contributions from 885 Union members.¹¹ Respondents

⁵ Dec. 1, 2017 E-mail.

⁶ Oct. 26, 2017 E-mail.

⁷ *Id.*

⁸ *Id.*

⁹ June 16, 2017 E-mail.

¹⁰ Although it appears that the violations may reach back decades, we limited the scope of the investigation to activity from 2012 forward, and we have 420 days of tolling. In its initial response, Respondents provided a list of SSF contribution amounts for 2012 through 2016. *See* June 16, 2017 E-mail. They later amended the total SSF contribution amount to include 2017 contributions. *See* October 26, 2017 E-mail. Counsel for Respondents further noted that due to the recordkeeping procedures put in place by previous Union leadership, Respondents could not guarantee that the list contained every individual who made contributions via payroll deductions during the previous five years. *Id.*

¹¹ June 16, 2017 E-mail. After being notified of the reason to believe findings, counsel informed OGC counsel that the Union was seeking to rectify the situation by creating written authorizations for the SSF that conform to the Act's requirements and requiring every Union member that chooses to contribute to the SSF to execute one. *Id.*

1 explained that they did not obtain written authorizations for SSF contributions because they
2 mistakenly believed that the written statements in the Union's Collective Bargaining Agreement
3 ("CBA") regarding other payroll deductions also covered deductions for SSF contributions.¹² As
4 mentioned above, Maloney explained that the Union orally told members they could opt out if
5 they did not wish to contribute.¹³ In an amended response, Respondents stated that they had
6 located written authorizations for 125 union members associated with the RAC unit.¹⁴
7 Respondents indicated that another 300 members of the RAC unit also contributed to the PAC
8 during the same time period, but did not sign authorizations for their SSF payroll deductions.¹⁵
9 Accordingly, at least 1,310 union members contributed to the SSF from 2012 through 2017.¹⁶

10 Further, the 125 written authorizations the Respondents provided do not comply with the
11 Act and Commission regulations. They do not inform members of the voluntary nature of the
12 SSF contributions or the right to refuse to contribute without reprisal, and they pre-set the
13 amount of the contributions (either \$.02 or .05 per hour worked) without providing an option to

¹² *Id.* The CBA refers to non-SSF funds into which its members pay, specifically, the Personal Fund (Article XV). *See* Compl. Resp. (MUR 7028), CBA at Articles XV (Apr. 4, 2016). The Personal Fund requires a signed authorization form from the Union member. *See* Article XV, CBA. The CBA does not mention the PAC or contributions to the PAC. *Id.*

¹³ *See* note 3.

¹⁴ *See* RAC Unit Authorization Forms and Nov. 2, 2017 E-mail. We asked why this particular subset of the RAC unit was required to sign written authorizations. Counsel responded that the current Union leadership recently learned that these SSF authorizations existed and that they were historically supplied to the members of this particular unit. *See* October 26, 2017 E-mail. Counsel further stated that past practice appears to have differed for this unit because it is a small, separate, and distinct unit. *Id.*

¹⁵ RAC Unit Authorization Forms and October 26, 2017 E-mail. Respondents were unable to explain why 125 of the RAC members had signed authorizations, but the remaining 300 members had not. *Id.*

¹⁶ October 26, 2017 E-mail.

1 contribute a different amount.¹⁷ Adding the 2017 SSF contributions made by the 425 RAC unit
2 members increases the total post-2012 SSF contributions from \$1,920,582.52 to \$2,375,742.49.¹⁸

3 During 2012-2017, the PAC made significant federal contributions and expenditures,
4 including \$47,000¹⁹ in contributions to federal candidates/committees; and \$218,988.49²⁰ in
5 transfers/contributions to a federal political committee, the United Association Political
6 Education Association (Association of Journeyman of the Plumbing and Pipefitting Industry of
7 the United States and Canada) ("UAPEA").²¹ In total, Respondents collected and expended
8 \$265,988.49 in federal funds through its reverse check-off system.

9 Once the Union acknowledged that it did not have written authorizations for most of the
10 relevant PAC contributions, and we informed them that the authorizations it did have were

¹⁷ See RAC Unit Authorization Forms.

¹⁸ The total SSF contribution figure (\$2,375,742.49) for 2012 through 2017 is broken down accordingly: 2012 = \$352,648.06; 2013 = \$324,687.74; 2014 = \$345,711.43; 2015 = \$388,286.09; 2016 = \$509,249.21; and 2017 = \$455,159.96. See Oct. 26, 2017 E-mail. Respondents have indicated that Rupert Baptiste contributed a total of \$8,304.69 to the SSF since he transferred membership to Plumbers and Pipefitters in 1998. See Aug. 4, 2017 E-mail. This amount is included in the \$2,375,742.49 figure. In addition, the Union has reimbursed 26 members for SSF contributions over the past five years in an amount totaling \$11,535.79. See Oct. 26, 2017 Email. This amount does not include Baptiste's requested reimbursement totaling \$1,485.95 for 2014 and 2015. The Respondents have indicated that they intend to honor Baptiste's request for reimbursement pending the resolution of the Complaint. See June 16, 2017 E-mail.

¹⁹ Taking into account the 420 days of tolling the Respondents have provided, two contributions the PAC made to federal candidates/committees on February 3, 2012 and March 5, 2012, totaling \$4,000, are now outside the statute of limitations.

²⁰ Taking into account the 420 days of tolling the Respondents have provided, transfers/contributions the PAC made to UAPEA between January 5, 2012 and May 4, 2012, totaling \$11,753, are now outside the statute of limitations.

²¹ See Disclosure Reports, Plumbers and Pipefitters Local Union No. 9 PAC (2012-2017). UAPEA is registered with Commission as separate segregated fund of the United Association of Journeyman of the Plumbing and Pipefitting Industry of the United States and Canada and as a lobbyist/registrant PAC. See Amended Statement of Organization, UAPEA (Dec. 27, 2016).

insufficient, it drafted a new authorization form and provided it to OGC for review.²² This new form appears to comply with the Act and regulations.

IV. LEGAL ANALYSIS

A. Law

The Act and Commission regulations prohibit labor organizations from making contributions in connection with a federal election, and a political committee is prohibited from knowingly accepting or receiving such contributions.²³ Labor organizations are permitted to establish and solicit political contributions to a separate segregated fund ("SSF").²⁴

It is unlawful for an SSF to make a contribution or expenditure by utilizing "dues, fees, or other moneys required as a condition of membership in a labor organization or as a condition of employment."²⁵ All contributions to a SSF must be voluntary and without coercion.²⁶ To ensure that contributions solicited for a SSF are voluntary, the Act and the Commission's regulations make it unlawful for any person to solicit a contribution to a SSF without informing the employee of the political purpose of the SSF and of the right to refuse to contribute to the SSF without reprisal.²⁷ Further, if the labor organization suggests a contribution amount, the solicitation must also state that the amount is merely a suggestion and that the individual is free

²² See June 16, 2017 Email; Letter from Rupert Baptiste to FEC, OGC (Feb. 20, 2018) ("Feb. 20, 2018 Ltr."); E-mail from Andrew Watson, Esq. to Kimberly Hart, OGC (Apr. 27, 2018) ("Apr. 27, 2018 E-mail").

²³ 52 U.S.C § 30118(a); 11 C.F.R. § 114.2(b), (d).

²⁴ *Id.* § 30118(b)(2)(C); 11 C.F.R. § 114.1(a)(2)(iii).

²⁵ 52 U.S.C § 30118(b)(3)(A); 11 C.F.R. § 114.5(a)(1).

²⁶ *Id.* § 30118(b)(3); *Id.* § 114.5(a); see also Advisory Op. 2003-14 at 3 (Home Depot).

²⁷ *Id.* § 30118(b)(3)(B)-(C); *Id.* § 114.5(a)(3)-(4)).

1 to contribute more or less.²⁸ A solicitation may be considered coercive if proper notices are not
2 given.²⁹

3 A labor organization may use a payroll-deduction or check-off system to collect
4 contributions to its SSF.³⁰ A contributor, however, must affirmatively authorize such payroll
5 deductions from the contributor's wages.³¹ The Commission has previously applied the
6 requirements of the Act and Commission regulations to union check-off forms, and endorsed
7 sample language that conforms with the "right to refuse"³² and "suggested contribution"³³
8 requirements.

9 Further, a reverse check-off, by which SSF contributions are deducted from wages unless
10 an employee opts out, is "*per se* violative of section 441b(b)(3)(A)'s [now section
11 30118(b)(3)(A)'s] prohibition."³⁴ The SSF is required to report the contributions it receives,

²⁸ *Id.* § 114.5(a)(2).

²⁹ Conciliation Agreement at ¶7, MUR 5337 (First Nat'l Consumers Bank) ("A solicitation can also be coercive if proper notice is not given.").

³⁰ *See generally* Advisory Opinion 2013-12 (SEIU and SEIU COPE) at 3.

³¹ *See* 11 C.F.R. § 114.2(f)(4)(i). *See also* Statement of Policy; Recordkeeping Requirements for Payroll Deduction Authorizations, 71 Fed. Reg. 38,513 (July 7, 2006). While certain other forms of documentation may serve as proof of payroll documentation authorization, signed payroll deduction forms may serve as the best documentation that a deduction was authorized at a particular time for a particular amount. *See id.* In any event, Respondents had no documentation to show that the majority of the payroll deductions were properly authorized.

³² Advisory Opinion 2006-17 (Berkeley Electric Cooperative) ("AO 2006-17"). In that opinion, the Commission approved a sample checkoff card that: (1) asked members to affirm that they "voluntarily donate"; (2) contained a blank check box that allowed a member to choose I elect not to participate at this time"; (3) and stated "I am fully aware that should I elect not to participate I may do so without any concern of retaliation." *Id.*

³³ *Id.* The sample card in AO 2006-17 also contained suggested contribution amounts, clearly labeled them "recommended amounts per pay period" and explicitly stated "[t]he recommended contribution amounts listed above are merely suggestions. Employees may choose to give more or less than those stated. [Requestor] will not favor nor disfavor employees according to pledged donations." *Id.* The card also provided a blank space for employees to write in the exact number they wished to contribute. *Id.*

³⁴ *FEC v. Nat'l Educ. Ass'n*, 457 F. Supp. 1102, 1110 (D.D.C. 1978); *see also* Advisory Op. 2001-04 (MSDWPAC) (Apr. 19, 2001); *see also* MUR 4351 (UMWA) (the Commission found reason to believe based on

1 including those made via payroll deduction, and it must maintain records for matters required to
2 be reported for three years after the report is filed.³⁵

3 **B. Analysis**

4 The information the Respondents provided during the investigation confirms the
5 Commission's previous finding that Respondents violated 52 U.S.C. § 30118(b)(3)(A)-(C) and
6 11 C.F.R. § 114.5(a)(2)-(5) by failing to obtain appropriate voluntary authorizations for the
7 payroll deductions from the Complainant and 1,184 other Union members, and by accepting
8 those contributions without proper authorizations. In addition, Respondents operated a reverse
9 check-off system under which they deducted amounts for SSF contributions unless members
10 affirmatively chose to opt out by requesting a refund.

11 As to the remaining 125 members, the Union used an authorization form that does not
12 conform to the Act or regulations. The form does not contain any language regarding the
13 voluntary nature of the SSF contributions or the prohibition against reprisals for failure to
14 participate, and it includes a pre-set amount for the contributions. Further, it contains no
15 language stating that the member can choose not to contribute or can contribute more or less than
16 the amount shown on the form.³⁶ Therefore, the Union's contribution authorization form failed
17 to conform to the Act and regulations.³⁷

the apparent use of a reverse check-off system, but took no further action after the investigation demonstrated that the deductions were not deposited in account used to make federal contributions).

³⁵ *Id.* § 30104; 11 C.F.R. §§ 104.14(b), 104.8(b), 114.5(e)(3).

³⁶ *See* RAC Unit Authorization Forms.

³⁷ Even though a solicitation can be considered coercive if the proper notices are not given, the available information does not suggest that the Union or SSF were taking other steps to pressure members to contribute to the SSF prior to 2017. *See e.g.*, Conciliation Agreement at ¶7, MUR 5337 (First Nat'l Consumers Bank) ("A solicitation can also be coercive if proper notice is not given."). Accordingly, we make no recommendations involving on coercion with respect to the union's method of solicitation of its membership prior to 2017.

1 The Union argues that it orally solicited its members and in doing so, informed its
2 members of the voluntary nature of their contributions and of their right to seek refunds of their
3 contributions. These arguments are unavailing because Respondents produced no evidence that
4 they provided all of the required warnings and disclaimers.³⁸ Further, the 125 written
5 authorizations Respondents did provide were themselves deficient, casting further doubt on
6 Respondents' claim that its oral warnings complied with the Act and regulations. In addition,
7 with the exception of the 125 written authorizations, the Union had no documents showing that
8 the deductions were authorized for any particular amount or time period.³⁹

However, in early 2018, we received information from the Complainant that the Union's business agents were threatening Union members' future employment if they did not sign new authorization forms. *See* Letter from Rupert Baptiste to FEC, OGC (Jan. 29, 2018) ("Jan. 29, 2018 Ltr"). Baptiste provided OGC with the names and contact information for four Union members who informed him of the alleged coercive tactics. *See* E-mail from Rupert Baptiste to Kimberly Hart, OGC (Mar. 7, 2018) ("Mar. 7, 2018 Email"). We were able to contact two of those members, Gary Panek and Billy DeGraw. Gary Panek indicated that the business agents tried several times to obtain his signature on the PAC authorization form, but he declined to contribute and did not feel coerced. Another member, Billy DeGraw, informed us he did not wish to cooperate and would have nothing to say about the coercion allegations. The remaining two Union members, John Stokes and John Sibert, did not respond to our calls. We also provided counsel with notice of the coercion allegations and gave respondents an opportunity to respond. *See* Letter to Andrew Watson, Esq. from Kimberly Hart, OGC (Mar. 28, 2018) ("Mar. 28, 2018 Ltr"). Respondents denied that any of the actions of the business agents constituted coercion. *See* Letter from Andrew Watson, Esq. to Kimberly Hart, OGC (Apr. 27, 2018) ("Apr. 27, 2018 Ltr"). Given the lack of evidence to corroborate the coercion allegations or any other evidence to suggest coercion, we make no recommendation to the Commission regarding this issue.

³⁸ *See* 52 U.S.C. § 30118(b)(3)(A)-(C); 11 C.F.R. § 114.5(a)(1)-(5). The SSF is: 1) prohibited from making a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination or financial reprisals or the threat thereof; or by monies required as a condition of membership in a labor organization or as a condition of employment; 2) allowed to suggest a guideline for contributions during solicitation as long as it is made clear that the member is free to contribute more or less than the suggested guideline or not at all without the Union favoring or disfavoring a member based on the amount of the contribution or decision not to contribute at all; 3) must inform the member of the political purpose of the SSF at the time of the solicitation; and inform the member at the time of solicitation of the right to refuse to contribute with no reprisal. *Id.* § 114.5(a)(1)-(4). In addition, the regulations state that if the solicitation is in writing, the statements must comply with section 114.5(a)(2) if a guideline is suggested as well as (a)(3) and (a)(4). *Id.* § 114.5(a)(2), (a)(3)-(a)(4).

³⁹ The Commission's Policy Statement provides that, in many instances, the signed payroll deduction authorization may serve as the best documentation that the deduction was authorized at a particular time and for a particular amount. *See* Statement of Policy: Recordkeeping Requirements for Payroll Deduction Authorization, 71 Fed. Reg. 38513 (July 7, 2006). It also provides that the Commission would accept other evidence as proof that the requirements of section 104.14 have been satisfied. *Id.*

1 We conclude that the Union and SSF violated the Act and Commission regulations by
2 failing to use the proper procedures for soliciting SSF contributions totaling \$2,375,742.49 from
3 its membership between 2012 and 2017, and by accepting those improper contributions, and
4 utilizing such funds to make federal contributions and expenditures.

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V. RECOMMENDATIONS

1. Enter into pre-probable cause conciliation with Plumbers and Pipefitters Local Union No. 9 and Plumbers and Pipefitters Local Union No. 9 PAC and Michael Maloney in his official capacity as treasurer.
2. Approve the attached joint conciliation agreement.
3. Approve the appropriate letters.

Lisa J. Stevenson
Acting General Counsel

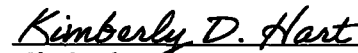
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Attorney

6.28.18

Date